

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 13, 2009

STATE OF TENNESSEE v. MILAYA “STUFFY” WEBSTER

**Appeal from the Circuit Court for Maury County
No. 14630 Robert Holloway, Judge**

No. M2008-00698-CCA-R3-CD - Filed March 11, 2009

The Defendant, Milaya “Stuffy” Webster,¹ was charged with three counts of aggravated assault. Following a jury trial held on May 21-24, 2007, she was convicted of three counts of reckless endangerment and sentenced as a Range I, standard offender to an effective sentence of four years and six months, to be served on probation. In this direct appeal, she argues that: (1) the trial court erred in admitting the former testimony of a certain witness; (2) the trial court erred in excluding testimony that the Defendant’s sister, her co-defendant in a previous trial arising from the same incident, was acquitted of criminal wrongdoing; (3) the State presented evidence insufficient to convict her; and (4) the trial court erred in ordering the Defendant to serve her sentences consecutively. We conclude that the trial court made no evidentiary errors and that the evidence at trial was sufficient to support the Defendant’s conviction. We also conclude that the trial court did not err in ordering consecutive sentences, but notice as plain error that the trial court enhanced the Defendant’s sentence in violation of the Sixth Amendment to the United States Constitution. We accordingly modify the Defendant’s sentence to three years to be served on probation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as
Modified**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Wesley Mack Bryant, Columbia, Tennessee, for the appellant, Milaya “Stuffy” Webster.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

¹ It is the policy of this Court to use the Defendant’s name as it appears on the indictment.

OPINION

Factual Background

The facts of this case were heavily disputed during the trial. Both the State and the Defendant agree that the events underlying the incident at issue began on June 3, 2004. The State's witnesses established that, on that day, Tenesha Orr picked up her friend Faye Vouris between 3:00 and 3:30 p.m. and returned to Orr's house. Shekisha Oden and Meanna McKissack were also present at the house, along with Orr's physically disabled eleven-year-old daughter. The group ate dinner between 6:00 and 7:00 p.m. Orr had a few drinks but did not become intoxicated. No one else drank. Another friend named Piper Shannon arrived around 8:00 p.m.

At about 10:00 or 10:15 p.m., Orr called the cell phone of her boyfriend, Kivoski Pye. Pye was at what Orr believed to be his home, 105 Cloverdale Street. While speaking to Pye, Orr heard a female yelling in the background. Milaina Webster, the Defendant's sister and a woman with whom Orr had a history of violent disagreement, took the phone from Pye and began screaming at Orr. Orr had never seen or known Milaina to be at Pye's residence.² At this time, Orr and her friends were in her front yard, and Orr had engaged her cell's speaker phone function so that they could all hear what was being said. Milaina, who was apparently also romantically involved with Pye, angrily challenged Orr to come over there and "bring [her] retarded child because she's better off dead anyway."

Orr "snapped" and decided to drive over to the residence to confront Pye about Milaina's presence. She, McKissack, Oden, and Vouris all got into Orr's Ford Explorer. Shannon stayed with Orr's daughter. Orr drove. Vouris sat in the front passenger seat, and McKissack and Oden sat in the backseat. The four did not converse on the way to Cloverdale Street. They had no weapons.

No other vehicles were present at Pye's residence when they arrived. Pye sat on the porch. Orr parked her vehicle, got out, and spoke to Pye, who had walked to the front of the residence's driveway. McKissack, Oden, and Vouris all stayed in the car. After a few minutes, Milaina and the Defendant drove up in a black Chevrolet Malibu. They parked. Orr did not approach the Malibu. Neglecting even to put her car in gear, Milaina quickly got out of the driver's seat holding an aluminum bat. She approached Orr and struck her torso with the bat three or four times. Pye got into the Malibu and put it in gear. Orr and Milaina grappled for control of the bat; it soon "went flying," but Orr and Milaina continued to fight with their fists.

The Defendant then approached with a "black object" in her hand. She hit Orr in the back and pulled her hair. Oden exited the Explorer and pulled the Defendant off of Orr. While wrestling with the Defendant, Oden felt pain as though she was being stabbed. Shortly thereafter, a bloodied Oden returned to the Explorer, slumped into its backseat, and said the Defendant had stabbed her and she could not breathe. McKissack then exited the Explorer and began fighting with the Defendant.

²Orr later learned that the property's lease was in Milaina's name, and Pye had been living with her.

She also felt a stabbing pain while fighting the Defendant. After a short time, McKissack also returned to the Explorer's backseat with blood on her. She was also having trouble breathing.

Orr and Milaina were still fighting and had moved to the driveway at 102 Cloverdale Street. The Defendant walked toward them. At that time, Chris Polk, a friend of Milaina and Pye who had been at their residence earlier in the day, approached and pushed Orr and Milaina away from each other. Orr returned to the Explorer with blood on her. Vouris, still in the front passenger seat, moved over into the driver's seat. Orr entered the front passenger seat. McKissack and Oden were panicking and screaming that they could not breathe. No one but the Defendant had been near McKissack or Oden when they were stabbed.

Vouris started the Explorer and drove directly to Maury Regional Hospital, reaching it at about 11:00 p.m. McKissack, Oden, and Orr were all treated. McKissack had suffered one stab wound, which partially collapsed her right lung. A stab wound had partially collapsed Oden's left lung. She also had a laceration on one of her wrists. Orr suffered a stab wound to her left side, which partially collapsed her left lung. Each victim's bloody and torn clothes were introduced into evidence.

Investigating the scene after the incident, police located two different areas of pooled blood on the street near 105 Cloverdale Street. Each was twelve to eighteen inches in diameter. Another pool of blood was found in the driveway of 102 Cloverdale Street. Acting on information given to him by Pye, Officer Paul McCormick of the Columbia Police Department found two aluminum baseball bats lying in the grass behind 104 Cloverdale Street.

The Defendant later gave a statement to Detective Troy Potts in which she stated that she took a black object from Orr and threw it down onto the ground. Learning as she had that McKissack, Oden and Orr all suffered stab wounds, the Defendant agreed with Det. Potts that the object must have been a knife, although she did not know that at the time. The Defendant and Det. Potts returned to 105 Cloverdale Street to search for the object. They were unable to find it, however, and the police never recovered a knife.

The Defendant chose to testify and also presented witnesses. Defense witnesses testified that the June 3, 2004 incident began when Orr began harassing Milaina with incessant calls to her cell phone. One such call came when Milaina was on the phone talking to her and the Defendant's mother, Patience Pillow. Milaina told Pillow that Orr was calling and had been calling for some time. Based on previous violent incidents between Milaina and Orr, Pillow told Orr to meet her at the courthouse, where they would see a magistrate.

Milaina and the Defendant began to drive toward the courthouse. As they approached, they noticed Pillow driving away. They stopped to speak with her, at which point Pillow informed them that the magistrate was not available. Pillow then drove away; Milaina and the Defendant began driving back to 105 Cloverdale Street. On the way there, Orr called Milaina again and said, "Bitch, where you at, I'm at your house." Milaina called Pye and asked if Orr was there. Pye, who was

inside the residence, said he had not seen her. Milaina never made any derogatory comments about Orr's daughter.

When Milaina and the Defendant arrived at 105 Cloverdale Street, however, they saw Orr in the front yard talking to Pye. Milaina parked her car. There were no weapons in the car. Seeing the car drive up, Orr approached Milaina's door and tried to open it but could not. The Defendant told Milaina not to get out of the car because Orr had "something black" in her hand. The Defendant then exited the car, circled around, and grabbed Orr from behind, hitting Orr's hands against the car in order to jar the black object loose. The Defendant did not know whether Orr dropped the object. During her testimony, the Defendant denied that she ever held the object and then admitted that she might have held the object while fighting McKissack and Oden. She also denied that the object was a knife and later admitted that it might have been a knife.

Orr called for Oden to help her. The Defendant then began to fight Oden while Orr fought Milaina, who by this time had exited her car. Oden called for McKissack to help her. McKissack approached and hit the Defendant, causing her to fall on Oden. After a few moments of scuffling with McKissack, the Defendant stood up and told McKissack she had nothing to do with the dispute and they had no reason to fight. McKissack agreed and withdrew. The Defendant then saw Orr and Milaina struggling with a bat across the street. She did not know where the bat had come from. She ran over to them with the intention of breaking up the fight. Pye separated Orr and Milaina before the Defendant reached them. Orr and Milaina started fighting again, at which point Polk ran up and separated them again. The Defendant returned to the residence, and Orr's Explorer "zoomed" away. The Defendant and Milaina had never had any previous problems with McKissack, Vouris, or Oden, but had suffered frequent harassment from Orr.

The trial court instructed the jury on the elements of aggravated assault, reckless aggravated assault, assault, and reckless endangerment. The jury found the Defendant guilty of three counts of reckless endangerment. The trial court later sentenced her to an effective term of four years and six months, to be served on probation. She now appeals.

Analysis

I. Admission of Faye Vouris' Former Testimony

The Defendant had been tried previously based upon the conduct at issue in this case; that proceeding resulted in a hung jury. Faye Vouris had testified at that trial but could not be located to testify again. Before this trial began, the State moved to introduce Vouris' former testimony.

The determination of whether a statement is hearsay and whether it is admissible through an exception to or exclusion from the hearsay rule is governed by Tennessee Rules of Evidence 801-804. Trial courts have broad discretion in applying the hearsay and relevance rules, and we will not overturn their decisions absent an abuse of discretion below. State v. Stinnet, 958 S.W.2d 329, 331 (Tenn. 1997), State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997).

Although hearsay, “[t]estimony given as a witness at another hearing of the same or a different proceeding” is admissible “if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination” and the “declarant is unavailable as a witness.” Tenn. R. Evid. 804(b)(1). “Unavailability of a witness” includes a situation in which the declarant “[i]s absent from the hearing and the proponent of the a statement has been unable to procure the declarant’s attendance by process” Tenn. R. Evid. 804(a). Absent an abuse of discretion below, we will uphold a trial court’s determination that a declarant is unavailable. See Hicks v. State, 490 S.W.2d 174, 179 (Tenn. Crim. App. 1972).

The Defendant concedes that she had an opportunity and similar motive to develop Vouris’ testimony at her previous trial; indeed, Vouris’ previous trial testimony, as read into the record at this trial, included a substantial cross-examination and was presented in an attempt to convict the Defendant of the same crimes. The Defendant contends, however, that the State did not demonstrate Vouris’ unavailability.

Jim Matthews, an investigator for the district attorney’s office, testified in support of the State’s motion to present Vouris’ former testimony. The State had attempted to subpoena Vouris two or three times. In attempting to serve the subpoenas, Matthews had obtained three potential addresses for Vouris by checking with utility companies and with Solutia, a company that collects medical bills and court costs. Matthews was unable to locate Vouris at any of the three addresses; at one of them, he spoke to a woman who said that Vouris “kind of roams from here to there” and had not been seen recently. Matthews subsequently checked with that woman a few other times, to no avail. He also checked Vouris’ social security number for places of employment but did not find any. Finally, he confirmed that Vouris was not in jail. He did not, however, ask any of the victims for information about Vouris’ whereabouts.

Orr testified that she did not know where Vouris was, but she noted that the district attorney’s office had not asked her about Vouris’ whereabouts until a few days before trial. Gloria Oden, mother of Orr and Shekisa Oden, testified that she did not know where Vouris was. She also testified that she had spoken to the district attorney’s office about Vouris a number of times over the preceding months.

As the proponent of the former testimony in this case, the State had the burden of showing it had made a good faith effort to obtain Vouris’ presence. See State v. Summers, 159 S.W.3d 586, 597 (Tenn. Crim. App. 2004); see also Barber v. Page, 390 U.S. 719, 724-25 (1968). The Defendant argues that the State failed to make a good faith effort because it did not ask McKissack or Oden about Vouris’ whereabouts. We conclude that the trial court did not abuse its discretion in ruling that the State met its burden. The State detailed its extensive efforts to locate Vouris using employment and billing records. It also asked Orr and Gloria Oden if they had seen her; they had not. The State’s failure to ask each of Vouris’ known acquaintances about her whereabouts is insufficient to demonstrate a lack of good faith effort on its part.

Even if the trial court had committed error by introducing Vouris' former testimony, we conclude that the error would be harmless. See Tenn. R. Crim. P. 52(a). Vouris' testimony was almost entirely cumulative to the testimony of McKissack, Orr, and Oden. Finally, introduction of Vouris' testimony did not violate the Defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution because, as noted above, Vouris was unavailable and the Defendant had a prior opportunity to cross-examine her. See Crawford v. Washington, 541 U.S. 36, 53-54 (2004). This issue is without merit.

II. Exclusion of Testimony Regarding Milaina Webster's Acquittal at Previous Trial

Milaina Webster, having been charged with aggravated assault for her alleged baseball bat attack on Tenesha Orr, was a co-defendant in the Defendant's previous trial. Milaina was acquitted. In the instant trial, the Defendant wished to introduce proof of this acquittal. The trial court denied her requests, finding the testimony irrelevant and potentially prejudicial to the State.

The Defendant primarily wished to introduce Milaina's acquittal in order to establish a possible motive for what she characterizes as inconsistencies between McKissack, Orr, and Oden's testimony at the first trial and testimony at this trial. Milaina's acquittal, the Defendant argues, caused the victims to conform their testimony to one another in the interim between the two trials in an attempt to avoid an acquittal for the Defendant.

Only relevant evidence is admissible. See Tenn. R. Evid. 402. Tennessee Rules of Evidence 401 and 403 govern whether evidence is relevant. Trial courts have broad discretion in assessing relevance, and we will not overturn their decisions absent an abuse of discretion. Stinnet, 958 S.W.2d at 331, Dubose, 953 S.W.2d at 653. The trial court's exercise of discretion may not be reversed unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

"'Relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. We agree with the State that the trial court did not abuse its discretion in finding Milaina's prior acquittal irrelevant under Rule 401. Milaina's guilt or innocence of aggravated assault on Tenesha Orr had no tendency to make it more or less probable that the Defendant stabbed McKissack, Orr, or Oden.

Even if the evidence had been relevant, it would have been properly excluded under Tennessee Rule of Evidence 403, which states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Testimony about Milaina's acquittal may have tended to show that McKissack, Orr, and Oden had a motive to eliminate inconsistencies in the second trial; the Defendant was allowed to cross-examine each victim regarding any inconsistencies and ask whether the three had conformed their testimony, however, lessening any probative value Milaina's acquittal might have had. It also, as the trial court noted, presented a significant danger that the instant jury

would feel pressured or bound to “do what the other jury did.” We conclude the trial court did not abuse its discretion.

Finally, the Defendant argues that the State opened the door to introduction of Milaina’s acquittal during a certain exchange with her on cross-examination. Having reviewed that exchange, we disagree. The State did not refer to the previous trial or imply that Milaina was untrustworthy because she had incurred any legal punishment for her actions. This issue is without merit.

III. Sufficiency of the Evidence

The Defendant next contends that the evidence at trial was insufficient to convict her of reckless endangerment. Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State’s witnesses and resolves all conflicts in the evidence in favor of the prosecution’s theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

“A person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury.” Tenn. Code Ann. § 39-13-103(a). “[R]eckless endangerment committed with a deadly weapon is a Class E felony.” Tenn. Code Ann. § 39-13-103(b). A person acts recklessly when

the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard

of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302(c).

The Defendant argues that she could not have consciously disregarded a substantial and unjustifiable risk because she did not know the object in her hand was a knife. This argument is supported only by the Defendant's own testimony, however; State's witnesses testified that the Defendant exited Milaina's vehicle with the "black object" in her hand. McKissack and Oden then felt themselves being stabbed while fighting with the Defendant. Orr, who did not notice her injury until she reached the hospital, spent a period of time fighting alone with the Defendant.

Because we are required to credit the testimony of the State's witnesses, see State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997), we accept the jury's inference, based on the above information, that the Defendant knew she had a knife in her hand as she fought the victims in this case. A knife is a deadly weapon by virtue of its ability to cause death or serious bodily injury. See Tenn. Code Ann. § 39-11-106(5). Finally, the victims in this case actually suffered serious bodily injury. We conclude the State presented evidence sufficient to support the Defendant's guilt of three counts of reckless endangerment beyond a reasonable doubt.

IV. Sentencing

The Defendant was convicted of three Class E felonies and was sentenced as a Range I, standard offender. For a standard offender a Class E felony carries a one to two year sentencing range. Tenn. Code Ann. § 40-35-112(5). The trial court sentenced her to eighteen months on each count, finding as an enhancement factor that "[t]he personal injuries inflicted upon . . . the victim was particularly great." See Tenn. Code Ann. 40-35-114(6). The trial court found no mitigating factors.

The presentence report in this case indicates that the Defendant is a twenty-three-year-old female with no criminal history. At the time of sentencing, she was single and had obtained a GED. She had also attended High Tech Institute in Nashville for three months. She was in good physical and mental health, and she had no history of drug use. She also had some history of employment with Lasko and Saturn.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and

enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court’s findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court’s findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

A. Consecutive Sentencing

The Defendant contends that the trial court improperly ordered her to serve each of her sentences consecutive to the others. Tennessee Code Annotated section 40-35-115(b) lists the criteria a court must use to determine whether a defendant convicted of more than one criminal offense will serve the resulting sentences consecutively or concurrently. The trial court in this case ordered the Defendant to serve her sentences consecutively based only on its finding, by a preponderance of the evidence, that the Defendant “is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” See Tenn. Code Ann. § 40-35-115(b)(4). Although the decision between consecutive and concurrent sentencing is within the sound discretion of the trial court, see State v. James, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984), “the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.” State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

The trial court placed in the sentencing record its finding that consecutive sentencing was “necessary to protect society from [D]efendant’s unwillingness to lead a productive life and [D]efendant’s resort to criminal activity” Although the Defendant has no criminal record other than the charges in the instant case, we conclude that this finding is supported by the record. The Defendant stabbed three unarmed victims and demonstrated no remorse at sentencing, instead arguing that she was the true victim. We agree with the trial court’s finding that an extended

sentence was necessary to protect the public. See id. The trial court also noted in its findings of fact that the Defendant's consecutive sentences "reasonably relate[d] to the severity of the offenses committed." Id. We agree; an extended sentence is not unreasonable given the Defendant's violent and life-threatening acts. The Defendant is unable to overcome the trial court's presumption of correctness, and we accordingly uphold imposition of her consecutive sentences.

B. Enhancement of Sentence

Although the Defendant does not raise the issue, we note that the trial court violated her rights under the Sixth Amendment to the United States Constitution by finding enhancement factors by a preponderance of the evidence as forbidden by Blakely v. Washington, 542 U.S. 296, 313 (2004). The 2005 Amendments to Tennessee's Sentencing Reform Act of 1989 brought that act into compliance with Blakely and went into effect on June 7, 2005. The Defendant committed the crimes charged in these cases in 2004, however, and she has not signed an ex post facto waiver. Other than the fact of a previous conviction, any enhancement of her sentence based on judicially determined facts violated her Sixth Amendment rights. State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007).

We first note that the Defendant has waived this issue by failing to argue it during her sentencing hearing or raise it in her brief. Tenn. R. App. P. 36(a) (stating that "Nothing in this rule shall be construed as requiring relief to be granted to a party . . . who failed to take whatever action was reasonable available to prevent or nullify the harmful effect of an error."). Tennessee Rule of Criminal Procedure 52(b) states, however, that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Plain error requires a defendant to establish five factors: (1) "the record must clearly establish what happened in the trial court"; (2) "a clear and unequivocal rule of law must have been breached"; (3) "a substantial right of the accused must have been adversely affected"; (4) "the accused did not waive the issue for tactical reasons"; and (5) "consideration of the error is necessary to do substantial justice." State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors outlined in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

The trial court's enhancement of the Defendant's sentences based on the enhancement factor that the victims' personal injuries were particularly great violated the Defendant's Sixth Amendment rights under Blakely because it enhanced her sentence based upon facts not found by a jury. The sentencing record on appeal is clear, the trial court violated Blakely rules, and the Defendant had no incentive to waive her Sixth Amendment objection for tactical reasons. She can thus demonstrate the first, second, and fourth of the plain error requirements.

As to the third plain error requirement, a "substantial right" is a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense, and . . . constitutional in nature." Adkisson, 899 S.W.2d at 639. A Defendant's Sixth Amendment rights

are therefore “substantial.” Finally, we conclude that consideration of this error is necessary to do substantial justice by imposing a constitutionally sound sentence. Accordingly, we must modify the Defendant’s sentence to the minimum of one year for each reckless endangerment conviction for a total of three years to be served on probation.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant’s convictions and consecutive sentences. We also modify her sentence to one year for each conviction, with the sentences to be served consecutively to one another, for an effective sentence of three years, to be served on probation.

DAVID H. WELLES, JUDGE